

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

PROFESSIONAL JANITORIAL	)	
SERVICE OF HOUSTON, INC.,	)	
	)	
<i>Petitioner/Cross-Respondent,</i>	)	
	)	
v.	)	No. 15–60858
	)	
NATIONAL LABOR RELATIONS	)	
BOARD,	)	
	)	
<i>Respondent/Cross-Petitioner.</i>	)	

**PROFESSIONAL JANITORIAL SERVICE OF HOUSTON, INC.'S  
REPLY BRIEF IN SUPPORT OF  
MOTION FOR PARTIAL SUMMARY DISPOSITION**

Neither Respondent NLRB nor Intervenor SEIU can dispute that this Court’s precedent requires disposition of the primary issue in this case in Petitioner PJS’s favor. The law in the Fifth Circuit is settled: class-action waivers in arbitration agreements do not violate the National Labor Relations Act (“NLRA”). There is no need for the parties to expend substantial time and resources fully briefing a foregone conclusion. Nor is there any need for the Court to expend its limited time and resources dissecting merits-based arguments when the merits are already decided. Partial summary disposition is appropriate, and the NLRB and SEIU’s opposition is unfounded.

**I. There Has Been No Intervening Change in the Law, and Any Prospect that the Law May Later Change Is Irrelevant and Speculative at Best**

The NLRB and SEIU want the Court to clog up its docket with matters it has effectively already decided based on the speculative prospect that the Supreme Court may someday review and decide the class-waiver issue differently. To date, the NLRB has not sought *certiorari* in *Murphy Oil USA v. NLRB*, 808 F.3d 1013, 1018 (5th Cir. 2015) or any other case involving the issue. This of course says nothing of the next two steps—whether the Supreme Court would agree to hear the case, much less decide it in the NLRB’s favor. SEIU’s gleaming optimism on both the chances of Supreme Court review (“high likelihood”) and the timing of any Supreme Court ruling (“near future”) is unrealistic and, anyway, irrelevant.

If speculation that an established legal principle of this Circuit might later be altered by the Supreme Court were alone enough to perpetuate a case in this Court, then few cases would ever reach finality before being placed on hold. The NLRB’s implicit request that this case be stayed rather than decided on settled Fifth Circuit law is, accordingly, as impractical as it is baseless. (*See* NLRB Response at 5). PJS—a company doing business exclusively in this Circuit—has the right to have the Court review and apply the settled law of this Circuit to vacate the NLRB’s order that the class-action waiver in its arbitration policy is unlawful. No further briefing on the matter would be necessary or useful to do so.

## **II. The Fact that PJS Requests Only Partial Summary Disposition of this Case Is Not a Reason for Denial**

Both the NLRB and SEIU fail to concede what seems obvious—a great deal more time and expense would be required on everyone’s part to fully brief and pick through all of the legal theories and arguments underpinning the law in this Circuit that class action waivers in arbitration agreements do not violate the NLRA. The three separate issues in this case involve three separate rulings by the NLRB, each of which the Board analyzed separately, and each of which the Court is likely to analyze separately as well. *See, e.g., Murphy Oil USA*, 808 F.3d at 1018-22. PJS should be able to focus its brief on the two issues that are credibly in dispute, not on having to marshal an extensive defense of the correctness of the Fifth Circuit’s *own* established law on the third.

Partial summary disposition is not a novel concept, despite the NLRB and SEIU refusing to acknowledge its utility here. Partial summary judgment is quite indisputably a common mechanism in our jurisprudence to weed out the debatable arguments and claims from those that need not go the distance for a fully informed and correct ruling to be reached. The NLRB’s ruling that PJS’s class-action waiver violates the NLRA should be weeded out before full briefing.

## **III. The Court Has Summarily Disposed of Further Cases on the Identical Class Waiver Issue Since PJS Filed its Motion**

The NLRB concedes that this Court has recently granted summary reversal on this same issue in several other cases. (*See* NLRB Response at 5). The Court

issued *another* such ruling only two days ago in *Securitas Security Services USA v. NLRB*, No. 16-60304 (Aug. 16, 2016). Notably, Judge Dennis concurred with that summary reversal, *even while* urging the full Court to reconsider the class waiver issue. (*Id.*). This only serves to further demonstrate that the Fifth Circuit's rule of orderliness leaves no room for a different result.

### **PRAYER**

PJS respectfully requests that this Court grant summary reversal of the Board's decision and order that the class action waiver provision of PJS's Dispute Resolution and Arbitration Policy violates the NLRA.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that, on August 18, 2016, I electronically filed the foregoing document with the Clerk of the Court for the Fifth Circuit Court of Appeals by using the CM/ECF filing system, which will automatically send proper electronic notification and a copy of the filing to the following persons:

Ms. Linda J. Dreeben, *Deputy Associate General Counsel for NLRB*  
Ms. Kira Dellinger Vol, *Counsel for NLRB*  
Ms. Martha Kinard, *Director of NLRB Region 16*  
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/s/ Tim Rybacki  
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